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No. 99-1307

In the Supreme Court of the United States

CLIFFORD HOTTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Constitution requires that specific offense characteristics and sentencing adjustments that increase the defendant's offense level under the Sentencing Guidelines be proven as elements of the underlying criminal offense.

2. Whether the Constitution requires heightened procedural protections in the determination of sentencing enhancements that have the potential to substantially increase the defendant's offense level under the Guidelines.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unreported, but the judgment is noted at 189 F.3d 462 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1999. A petition for rehearing was denied on November 5, 1999. The petition for a writ of certiorari was filed on February 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner

was convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341; eight counts of wire fraud, in violation of 18 U.S.C. 1343; one count of securities fraud, in violation of 15 U.S.C. 78(j); and one count of conspiracy to commit mail, wire, and securities fraud, in violation of 18 U.S.C. 371. He was sentenced to 108 months' imprisonment and was ordered to pay a $250,000 fine and $9,571,429 in restitution. Pet. App. 1a-2a. The court of appeals affirmed. *Id.* at 8a.

1. Petitioner was the president, CEO, and chairman of the board of directors of Health Management, Inc. (HMI), a publicly traded company that provides pharmaceuticals to patients who require long-term drug therapy. Pet. App. 2a. In June 1995, HMI's chief financial officer, Drew Bergman, reported to petitioner and other HMI officials that the company's after-tax earnings for the 1995 fiscal year would be 54 cents per share, far lower than previously expected. Petitioner held a meeting at which corporate officials agreed to inflate the company's 1995 earnings by making it appear that large shipments of inventory had erroneously not been counted by HMI's outside auditors. *Ibid.* Petitioner and Bergman then recruited other HMI employees to make false statements and create false documents involving the fictitious drug shipments. *Id.* at 2a-3a.

By creating fictitious inventory and falsely inflating its sales, HMI was able to report its annual earnings to the Securities and Exchange Commission as 74 cents per share. Petitioner signed the SEC filing and asserted that the earnings report was accurate. Pet. App. 3a. After the earnings report was filed, petitioner and Bergman continued to overstate the company's inventory in order to conceal the scheme from HMI's auditors. *Ibid.*

The fraud was discovered after a new chief financial officer, Paul Jurewicz, replaced Bergman in late 1995. Jurewicz reported to petitioner that there were problems with HMI's inventory figures. Pet. App. 3a. When petitioner refused to notify the board of directors or HMI's counsel about the alleged inventory fraud, Jurewicz reported the problem to the company counsel, and an internal investigation followed. *Id.* at 3a-4a. Petitioner urged other participants in the scheme to lie to the investigators and himself told the investigators that the fictitious inventory shipments had in fact occurred. Upon disclosure of the fraud in 1996, HMI's stock price dropped from approximately $12 per share to $3.25 per share. *Id.* at 4a.

2. A federal grand jury returned an indictment charging petitioner with conspiracy to commit mail, wire, and securities fraud (Count 1), securities fraud (Count 2), four counts of mail fraud (Counts 3-6), and eight counts of wire fraud (Counts 7-14). Petitioner's first trial on the charges ended in a mistrial when the jury deadlocked. Pet. App. 4a. After a second trial, petitioner was convicted on all counts of the indictment. *Id.* at 5a.

At petitioner's sentencing, the district court calculated the amount of loss resulting from the fraudulent scheme by multiplying the decrease in HMI's stock price by the total number of shares of HMI stock owned by investors who were not involved in the fraud. Pet. App. 5a; Gov't C.A. Br. 22-23. The court determined that the shareholder loss was approximately $67 million. Pet. App. 5a. Accordingly, the court increased petitioner's base offense level of six under Sentencing Guidelines § 2F1.1 by 17 levels. Gov't C.A. Br. 23; see Sentencing Guidelines § 2F1.1(b)(1)(R) (providing for 17-level increase if loss is more than $40 million and not

more than $80 million). With a two-level enhancement because the offense involved more than minimal planning (Sentencing Guidelines § 2F1.1(b)(2)(A)), a four-level enhancement for petitioner's leadership role in the offense (Section 3B1.1(a)), and a two-level enhancement for his abuse of a position of trust (Section 3B1.3), petitioner's total offense level was 31, resulting in a Guidelines sentencing range of 108 to 135 months' imprisonment. Gov't C.A. Br. 23. The court sentenced petitioner to concurrent terms of 48 months' imprisonment on the conspiracy, mail fraud, and wire fraud counts, and to a consecutive term of 60 months' imprisonment on the securities fraud count, for a total of 108 months' imprisonment. Pet. App. 13a.

3. On appeal, petitioner argued, among other things, that the district court erred in determining the amount of loss that resulted from his fraudulent scheme.[1] Pet. App. 8a. The court of appeals, after noting that the district court's factual findings at sentencing are reviewed "for clear error," found that "[t]he Sentencing Guidelines contemplate the calculation of a fraud loss in the manner undertaken by the district court." *Ibid.* The court cited Application Note 9 to Sentencing Guidelines § 2F1.1, which states that "loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information." Thus, the court of appeals concluded, "the district court's loss findings were not erroneous, let alone clearly erroneous." Pet. App. 8a.

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[1] Petitioner also argued that in cases in which application of an upward adjustment results in a "substantially enhanced sentence[] * * *, a higher standard of proof is required—such as clear and convincing or even beyond a reasonable doubt where appropriate." Pet. C.A. Br. 56. The court of appeals did not address that claim.

ARGUMENT

1. Petitioner contends (Pet. 15-24, 26-28) that the Court should grant review to consider whether the Fifth and Sixth Amendments require that sentencing enhancements that "substantially increase the punishment that a defendant may be subjected to" under the Sentencing Guidelines must be proven as elements of the underlying offenses. This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Sentencing Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing judge by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Sentencing Guidelines "instruct the judge * * * to determine" type and quantity of drugs for which defendant is accountable "and then to impose a sentence that varies depending upon amount and kind"); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam); *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995).

Petitioner relies (Pet. 18) on *Jones* v. *United States*, 526 U.S. 227 (1999), citing the Court's statement that its prior cases "suggest" that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6. The constitutional principle proposed in *Jones*, however, would apply (if adopted) only to sentencing factors that "increase[] the

maximum penalty for a crime." *Ibid.* Specific offense characteristics and sentencing adjustments under the Sentencing Guidelines cannot increase the statutory maximum penalty for a criminal offense. See Sentencing Guidelines § 5G1.1; *Edwards* v. *United States*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"). In this case, petitioner was sentenced within the maximum term of imprisonment authorized by the statutes under which he was convicted. See 15 U.S.C. 78ff(a) (authorizing maximum penalty of ten years' imprisonment for violations of Section 78(j)); 18 U.S.C. 371, 1341, 1343 (authorizing maximum penalty of five years' imprisonment). Because the sentencing enhancements in this case did not increase the statutory maximum penalty for petitioner's offenses, *Jones* provides no support for his claim.

For the same reason, this case need not be held pending decision in *Apprendi* v. *New Jersey*, No. 99-478 (argued Mar. 28, 2000). *Apprendi* involves the constitutionality of a state "hate crimes" statute that increases the maximum term of imprisonment authorized for certain offenses from ten years to twenty years on the basis of factual findings made by the sentencing court under a preponderance-of-the-evidence standard. This Court granted certiorari to consider whether the New Jersey statute "unconstitutionally provides for an extended term of imprisonment increasing the maximum possible penalty by ten years, based on proof by a preponderance of the evidence, rather than proof beyond a reasonable doubt, and denies the defendant rights to notice by indictment and trial by jury." 99-478 Pet. at i. Because the sentencing factors at issue in this case had no effect on the maximum punishment authorized by the statutes under which petitioner was

convicted, the Court's disposition of the question in *Apprendi* is unlikely to affect the disposition of this case.

2. Petitioner also contends (Pet. 25-26, 29-30) that the petition should be granted to resolve a disagreement among the lower courts as to whether proof by a higher standard than a preponderance of the evidence is constitutionally required to establish the applicability of a sentencing factor that has the potential to substantially increase a defendant's punishment under the Sentencing Guidelines. This Court has noted the existence of a divergence of opinion among the courts of appeals on whether a higher standard might be required, in "extreme" circumstances, in making findings under the Sentencing Guidelines. See *United States* v. *Watts*, 519 U.S. at 156 & n.2; accord *Almendarez-Torres* v. *United States*, 523 U.S. 224, 247-248 (1998). The United States recently filed a petition for a writ of certiorari seeking resolution of that issue. *United States* v. *Reed*, No. 99-1096 (filed Dec. 29, 1999) (seeking review of *United States* v. *Hopper*, 177 F.3d 824 (9th Cir. 1999), cert. denied, 120 S. Ct. 1179 (2000)).[2] In

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[2] We explained in our petition in *Reed* that there is a conflict between the decision of the Ninth Circuit in that case requiring proof (in certain cirumstances) of a sentencing factor by clear and convincing evidence and decisions of the Tenth, First, and Fourth Circuits. See 99-1096 Pet. at 14-16 (citing *United States* v. *Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993), cert. denied, 511 U.S. 1020 (1994); *United States* v. *Lombard*, 102 F.3d 1 (1st Cir. 1996), cert. denied, 520 U.S. 1266 (1997); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1239 (4th Cir.), cert. denied, 493 U.S. 943 (1989)). We are aware of no appellate decision other than *Hopper* that has required proof of a sentencing factor by more than a preponderance of the evidence. Although petitioner cites (Pet. 26) three Third Circuit cases, we explained in the petition in *Reed* (at 11-12 & n.6) that those decisions involved departures from the

Reed, the court of appeals remanded a case to the district court for resentencing, based on the court of appeals' holding that certain sentencing factors had to be proven by clear and convincing evidence because of their effect on the defendant's sentence. When the district court reimposed the same sentence on remand after finding the sentencing factors so as to satisfy the court of appeals' standard, the petition for a writ of certiorari in *Reed* was dismissed on the government's motion. *United States* v. *Reed*, 120 S. Ct. 1578 (2000).

Although this case appears to present the question that we identified in *Reed*, further review of that question is unwarranted in this case. The court of appeals resolved this case in an unpublished opinion, and it did not expressly address petitioner's contention that the amount of the fraud had to be proven by more than a preponderance of the evidence. Since this Court often benefits from the fuller factual and legal analysis by the court of appeals that ordinarily accompanies a published opinion, those factors counsel against further review. In this case, for example, the fraud calculation was based on the conduct of the offenses of conviction (which was therefore proven to the jury beyond a reasonable doubt), and the same offense level would result even if the calculation of loss ($67 million, as

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Sentencing Guidelines, rather than the routine application of sentencing factors under the Guidelines, and the reasoning of those cases ultimately rests on an interpretation of the statute authorizing departures from the Guidelines, not a direct application of the Due Process Clause. See *United States* v. *Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990); cf. *United States* v. *Paulino*, 996 F.2d 1541, 1545 n.4 (3d Cir.) (confining *Kikumura* to the departure context), cert. denied, 510 U.S. 968 (1993). None of the other appellate decisions cited by petitioner actually required application of a clear-and-convincing (or higher) standard.

found by the district court) were in error by up to $27 million.[3] See Sentencing Guidelines § 2F1.1(b)(1)(R) (17-level enhancement if loss is more than $40 million and not more than $80 million). In those circumstances, there is no reason to conclude that the standard of proof that would be required to prove the amount of the loss had any effect on petitioner's sentence. That is particularly true since determination of the amount of the loss was required to be only "a reasonable estimate of the loss, given the available information." Pet. App. 8a. (quoting Sentencing Guidelines § 2F1.1, comment. (n.9)). The court of appeals' unpublished disposition did not examine the standard-of-proof issue or other issues that may have some bearing on the question presented, and the court of appeals' disposition of the issue without discussion has no precedential effect, even within the Second Circuit. While the proper standard of proof at sentencing presents a question worthy of this Court's resolution, this case does not afford a suitable vehicle for this Court's review.

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[3] As the court of appeals observed in affirming petitioner's conviction, "even though the specific loss figure of $60 million was not part of the trial record, the loss of multi-millions of dollars could reasonably be inferred from the evidence and the government could properly refer to the substantial loss during summation." Pet. App. 7a; see also Gov't C.A. Br. 43-47.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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